

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS

3 No. 1:18-cv-12217-WGY

4  
5 JOSEPH A. CARI,  
6 Plaintiff

7 vs.

8  
9 MEDCAP GROWTH EQUITY, et al,  
10 Defendants

11 \*\*\*\*\*

12  
13 For Hearing Before:  
14 Judge William G. Young  
At Suffolk University Law School

15  
16 Motion to Dismiss

17 United States District Court  
18 District of Massachusetts (Boston)  
19 One Courthouse Way  
Boston, Massachusetts 02210  
Tuesday, March 5, 2019

20 \*\*\*\*\*

21  
22 REPORTER: RICHARD H. ROMANOW, RPR  
23 Official Court Reporter  
24 United States District Court  
One Courthouse Way, Room 5510, Boston, MA 02210  
25 bulldog@richromanow.com

A P P E A R A N C E S

HAL K. GILLESPIE, ESQ.

Gillespie, Rozen & Watsky  
3402 Oak Grove Avenue, Suite 200  
Dallas, TX 75204  
(214) 800-5112  
Email: Hkg@gillespiesanford.com.

and

PAUL H. MERRY, ESQ.

Law Office of Paul H. Merry  
1 Gateway Center, Suite 308  
300 Washington Street  
Newton, MA 02458  
(617) 720-2400  
Email: Paul.merry@fairworkplace.net  
For plaintiff

ALICIA L. DOWNEY, ESQ.

Downey Law, LLC  
155 Federal Street, Suite 300  
Boston, MA 02110  
(617) 444-9811  
Email: Alicia@downeylawllc.com  
For defendants

1 P R O C E E D I N G S

2 (Begins, 2:05 p.m.)

3 THE COURT: Now hearing Civil Matter 18-12217,  
4 Cari vs. MedCap.

5 MS. DOWNEY: Good afternoon, your Honor,  
6 Alicia Downey for the defendants.

7 MR. MERRY: May it please the Court, my name  
8 is Paul Merry, I'm representing -- as local counsel  
9 representing the plaintiff, Mr. Joseph Cari, in this  
10 case, one of the opponents to the motion.

11 MR. GILLESPIE: Your Honor, may it please the  
12 Court, Hal Gillespie from Gillespie, Rozen & Watsky in  
13 Dallas, Texas, um, lead counsel for the party opposing  
14 the motion.

15 THE COURT: All right.

16 Let me see if -- the way the briefing has gone,  
17 let me see if I've got this right, and this is how I  
18 propose to proceed.

19 This is the defendants' motion. Plaintiffs have  
20 moved to amend. The defendants have promptly opposed  
21 that on the ground that the amendment is a futility.  
22 I've read all the briefs. I'm going to work from the  
23 proposed amended complaint, and naturally if it fails,  
24 um, there's nothing more to be done.

25 I'll hear in support of the motion to dismiss.

1 MS. DOWNEY: Okay. If I could use the podium?

2 THE COURT: Of course.

3 MS. DOWNEY: Thank you. Good afternoon, your  
4 Honor.

5 The, um, what's before you now is a proposed  
6 amended complaint that was submitted while a pending  
7 motion to dismiss was on file.

8 THE COURT: Yes, and I'm --

9 MS. DOWNEY: And I'm just --

10 THE COURT: -- I'm not troubled by that.

11 MS. DOWNEY: I know you just said that, I'm  
12 just -- the, um -- so I understand that they actually  
13 don't oppose dismissal of the complaint. I did raise,  
14 you know, the notion that two of the counts from the  
15 original complaint have been abandoned, so I do think  
16 the docket should reflect that, at the very least. But  
17 what's proposed in that complaint still has  
18 deficiencies, they are fatal deficiencies,  
19 notwithstanding what are clear attempts to --

20 THE COURT: Let's see if we -- what's  
21 abandoned here? Just so we're clear.

22 MS. DOWNEY: The, um -- from the original  
23 complaint there was a fifth cause of action for breach  
24 of fiduciary duty against Mr. Velis individually that is  
25 gone, um, and there is also the seventh cause of action

1 for an accounting that is also gone --

2 THE COURT: That's what I understand.

3 MS. DOWNEY: -- and it should be gone with  
4 prejudice for the reasons that I had previously argued.  
5 It's not merely a deficiency in pleading, but the  
6 failure to state any substantive --

7 THE COURT: You proceed.

8 MS. DOWNEY: The problem with the proposed  
9 amended complaint -- um, and I'll just start with the  
10 low-hanging fruit, it still claims a cause of action  
11 under Chapter 93A, the Consumer Protection Act, based on  
12 the disputes that are outlined in the proposed amended  
13 complaint. The plaintiff's own opposition and, um,  
14 brief in support of its motion to amend the complaint  
15 states expressly that the basis of this claim was the  
16 fraudulent inducement of Mr. Cari to move him out of his  
17 management job with the loss of his salary and into a  
18 consulting role. As I see it, that's a straight-up  
19 employer/employee dispute not within Chapter 93A.

20 The other part, the two-part scheme that both  
21 pleadings allege was an effort, an unsuccessful effort  
22 to persuade Mr. Cari to give up his equity interest in  
23 the limited liability company, which is also a defendant  
24 in this case, efforts made by the company in which he is  
25 part owner and another co-owner of the company. That is

1 purely an intracorporate dispute again. And the case  
2 law is clear, as a matter of law, that it's outside the  
3 scope of 93A. And so I do think that claim too is ripe  
4 for dismissal with prejudice even if you do allow the,  
5 um -- and that's why maybe the complaint is --

6 THE COURT: All right, so let's -- maybe you  
7 want to come to the harder ones.

8 MS. DOWNEY: Yes, the harder ones. They are  
9 hard, and the reason they're hard is because, um, you  
10 know I bear a burden as the movant on a motion to  
11 dismiss. We've got essentially contract claims and  
12 fraudulent or negligent inducement based on  
13 misrepresentation claims. Let's look at the contract  
14 claims first.

15 The original complaint referenced, um, Attachment  
16 A, which was a term sheet, the starred show, that  
17 attachment was not actually appendaged to the complaint  
18 that was filed, but it was served on us, and that  
19 attachment was then filed with the Court as Exhibit B to  
20 our motion to dismiss with redactions of specific  
21 financial information. That exhibit is signed by only  
22 one party, it is signed by Mr. Cari. And so naturally  
23 when I moved to dismiss, I thought of a brilliant  
24 argument that, "Hey, it's not signed by both parties."  
25 That's the basis of that argument.

1           Now a proposed amended complaint comes in with the  
2           new allegations that in fact a term sheet similar to  
3           this one was signed by both parties at an earlier date.  
4           Nobody has it. I can tell you in open court, I don't  
5           have it, my clients don't have it, their lawyers don't  
6           have it.

7           Now --

8           THE COURT: But it's a motion to dismiss --

9           MS. DOWNEY: It's a motion to dismiss, so  
10          let's credit the allegations.

11          THE COURT: -- and I take their obligations  
12          under Rule 11 very seriously and I know they do.

13          MS. DOWNEY: Um-hum.

14          THE COURT: So isn't it adequate pleading?  
15          Even if it doesn't exist, um, if it did exist and a jury  
16          were to believe it existed and was breached, a recovery  
17          could follow.

18          MS. DOWNEY: Let's assume that was the case,  
19          um, it still doesn't create an enforceable contract with  
20          respect to the terms that are outlined. It is -- it  
21          would be a signed agreement to negotiate in good faith  
22          necessary agreements to conclude, you know, the terms  
23          that are in here. It sets forth, quote, unquote, "the  
24          principal terms of what they negotiated as a new  
25          arrangement," it sets forth the general terms, that's

1 all they're agreeing to. And this -- and this is a  
2 four-corners-of-the-complaint question of law, an  
3 interpretation-of-the-contract argument, that as I read  
4 their opposition, and they agree it's just a question of  
5 law that can be decided at this stage of the case.

6 They say the unambiguous language reflects that it  
7 was a final agreement as to all essential terms. I have  
8 given you cases that suggest that this same type of  
9 language that we see in this term sheet and that,  
10 crediting the new allegations, was also contained in the  
11 earlier term sheet --

12 THE COURT: But shouldn't -- you say I can  
13 deal with this as a matter of law, and of course today  
14 it's a matter of law whether we call it "dismissal" or  
15 "summary judgment," but I have some problem with --  
16 recognizing that I can look at the term sheet because  
17 reference is made to it, I'm going to look at that, um,  
18 and I have to give all intendments their way.

19 Wouldn't it be better to resolve it, if it can be  
20 resolved, as a matter of law on a motion for summary  
21 judgment?

22 MS. DOWNEY: Not if the language is  
23 unambiguous. If the language is unambiguous, it is the  
24 language that decides that question, not allegations  
25 about subjective beliefs, what are the parties course of



1 dealing, or anything like that. If you decide the  
2 language is ambiguous, then it's a question for summary  
3 judgment.

4 THE COURT: All right.

5 MS. DOWNEY: Now my time is running out.

6 On the breach of the implied covenant of good  
7 faith and fair dealing, the law there -- and I think  
8 both in Massachusetts and Delaware, and I've made the  
9 case that it is Delaware law that applies here and not  
10 Massachusetts law, but I think it's true under either of  
11 the states' law that the breach of the implied covenant  
12 has to attach to something in the term sheet, it has to  
13 govern the manner of performance of some term in the  
14 term sheet. And here the breach of implied duty claim  
15 boils down to simply breach of the term sheet, it's the  
16 same thing, it's not breach of implied duty, and that  
17 claim can be dismissed for failure to state a claim.

18 The fraud claims. Many many problems there  
19 including under Rule 9(b). I still don't know -- and  
20 I'm the defendants's lawyer, I'm going to have to answer  
21 this complaint, I'm going to have to investigate these  
22 claims, but who said exactly what? With three  
23 exceptions. And I'm quoting the brief.

24 THE COURT: You have --

25 MS. DOWNEY: There is language in quotes,

1     there was a document that's submitted as being a  
2     fraudulent statement, the term sheet itself is  
3     characterized as a false promise. I know what it says.  
4     Everything else is described in general terms -- and  
5     just described. I don't know who said what. I also  
6     have no basis in this proposed amended complaint for  
7     concluding that the speakers or the writers knew of the  
8     falsity of the statements. That is a requirement.

9             THE COURT: Well that's a requirement for  
10    fraudulent misrepresentation, but on this pleading can I  
11    not infer it? You see I've got a pleading.

12            MS. DOWNEY: Right, but what specific facts  
13    allow you to refer that is missing, it's all alleged in  
14    conclusory terms, "They stated falsely," "They lied,"  
15    "They tricked Cari," they -- you know that's just a  
16    conclusion, that's not enough.

17            On the negligent misrepresentation claim, I think  
18    it says "clear-cut as to breach of implied duty,"  
19    there's elements that you need to have for that claim  
20    under Delaware law, which is a special relationship,  
21    special equities, like a fiduciary relationship, or a  
22    lawyer/client relationship, it is absent from this  
23    complaint. We have individuals, sophisticated business  
24    people represented by counsel.

25            On the Massachusetts formulation, "acting in the

1 course of business," it's an investment firm. Mr. Velis  
2 is the manager of an investment firm. Mr. Cari is not  
3 his customer, he is not an investor, he is not somebody  
4 to whom he is selling services.

5 THE COURT: Let's give him a --

6 MS. DOWNEY: That falls out, um, regardless of  
7 what you feel about whether the misrepresentations  
8 qualify as representations of fact or not.

9 THE COURT: Well let's give them a chance.

10 And let me tee this up and see if you're satisfied  
11 with this.

12 I'm going to turn to them now.

13 MS. DOWNEY: Oh, okay, I think my 10 minutes  
14 is probably up. Thank you.

15 THE COURT: One, I think that was a good  
16 presentation, and when you start, I think she's right  
17 that Delaware law applies, but there can't be a claim  
18 for a violation of Massachusetts General Laws, and I  
19 don't see any negligent misrepresentation claim here.  
20 But if I let the other three go, and I'm not saying I'm  
21 going to, I have some questions about it.

22 But if I let the other three go, breach of  
23 contract, breach of the covenant of good faith, and fair  
24 dealing under Delaware law, and fraudulent  
25 misrepresentation, you're fine with that, aren't you?

1 MR. GILLESPIE: I'm greedy, your Honor, I  
2 would prefer to have more. I would prefer to --

3 THE COURT: Well of course you would. But as  
4 a practical matter?

5 MR. GILLESPIE: Your Honor, Mr. --

6 THE COURT: Merry.

7 MR. GILLESPIE: -- Merry, Paul Merry, is going  
8 to argue the 93A part and the Delaware law part, and so  
9 I'd rather not step on his toes even though I got his  
10 name wrong.

11 THE COURT: So we'll hear from him.

12 And let me ask you this. If you are going for all  
13 of it, how possibly do you think you can support a  
14 negligent misrepresentation claim here?

15 MR. GILLESPIE: Well that's where discovery  
16 comes in. And if you read all of the pleadings, and if  
17 we incorporated everything and pulled them all into the  
18 negligent misrepresentation piece of this, um, then  
19 you're caught with a choice, either these were  
20 deliberate lies that Velis was making to Cari --

21 THE COURT: And I -- I started you out saying,  
22 "Well at least to the extent they're adequately pleaded,  
23 we'll let that one go forward."

24 How do you get negligent misrepresentation in  
25 addition?

1 MR. GILLESPIE: Your Honor, I think that if  
2 they're not deliberate lies, then they're negligent  
3 lies, because, um -- and I think that's got to be the  
4 fall-back position.

5 THE COURT: "Negligent lies"?

6 MR. GILLESPIE: Your Honor, let me --

7 THE COURT: I'm not familiar with "negligent  
8 lies"?

9 MR. GILLESPIE: Well let me point to the  
10 distinction that counsel may not have picked up on. I  
11 just read their brief and they filed it at 6:00 p.m. on  
12 Friday, so I've had a chance to look at their brief, but  
13 just barely, and one of the things that they missed was  
14 a significant distinction between the way this was pled  
15 to begin with and the way this has been pled in the  
16 amended complaint, and that is that what the lie was  
17 about, not that they had a commitment, um, but that  
18 Velis represented that he had a commitment. In fact  
19 there may not have been a commitment, the investment  
20 didn't get made. But Velis said, "I have a commitment,"  
21 that is a statement of fact. If in fact there wasn't a  
22 commitment, but Velis said there was, then that may be  
23 negligent or it may be deliberate. That's what  
24 discovery's going to have to get into.

25 But for **Twombly** purposes and **Iqbal** purposes, we've

1     pled this specifically as any pleading I've ever made,  
2     and I've been doing this a long time. This has got a  
3     lot of detail in it and it's not just conclusions. But  
4     there is a place for discovery once you've pled a  
5     plausible claim.

6             We -- you're more familiar with **Iqbal** and **Twombly**  
7     than most are, but this is a pleading that would get the  
8     doors of discovery open.

9             I want to say that --

10            THE COURT: What do you say to, um -- forgive  
11     my interruption, but I need the question answered.

12            What do you say to her argument, which would  
13     seemed rather cogent, that you either have a contract  
14     claim or you don't, and what is the breach of the  
15     implied covenant of good faith or fair dealing?

16            As I understand it, unless I've missed something,  
17     in Delaware law that cause of action is, as she properly  
18     stated, "in the performance of a contractual duty," it's  
19     the same thing, you either win or lose on the contract.  
20     What's -- what more should I be looking at for the  
21     breach of an implied covenant of good faith and fair  
22     dealing?

23            MR. GILLESPIE: Yeah, great question. And  
24     once you have the term sheet, then you've got -- you're  
25     setting up the consulting agreement, and in fact that

1 means a business relationship with it. At that point  
2 there was a transmogrification occurred -- a  
3 "transformation," I think that's a better word, Cari  
4 used to be a member of this LLC, but then he stopped  
5 being a member, he resigned, and he became a consultant.  
6 Once he becomes a consultant and his job is to go out  
7 and make and get investments and thereby possibly  
8 trigger a \$2.5 million payoff for himself, then they  
9 have an obligation not to get in the way, they have an  
10 obligation not to send him a cease-and-desist letter,  
11 they have an obligation not to threaten him if he does  
12 the job, the work the consultant would do, and there's  
13 an implied covenant of good faith and fair dealing that  
14 once you made a deal, you don't do things that would  
15 kill the deal.

16 THE COURT: And that's the misconduct that  
17 triggers that cause of action?

18 MR. GILLESPIE: Yes, sir.

19 And can I point something out because I'm almost  
20 out of time and I --

21 THE COURT: No, go right ahead.

22 MR. GILLESPIE: One thing, and it's important.

23 I have learned, since filing the proposed amended  
24 complaint, that Sam Hebert has actually got out of the  
25 members category within the LCC in February of 2017.

1 Again we haven't had discovery, but I have learned that  
2 we have to amend this complaint one more time at least.  
3 Because one of the things they keep talking about is how  
4 Mr. Hebert has to have said "Yes" to this term-sheet  
5 deal in order to have a proper ratification under the  
6 LCC, either or without. So the only person who had to  
7 say "Yes" was Velis who remained the one member of the  
8 LCC. That's important because it knocks out a whole lot  
9 of their argument. It's a question of fact. We would  
10 have pled it better if we had known the --

11 THE COURT: I agree, it's a question of fact.  
12 One last question and then we'll go to Mr. Merry.

13 What about the Rule 9(b), pleading fraud with  
14 particularity? Suppose I allowed the claim for  
15 fraudulent misrepresentation, but limited it to the term  
16 sheet and the other allegations that are supported with  
17 quotes, isn't that appropriate under 9(b) here?

18 MR. GILLESPIE: Your Honor, I think under  
19 9(b), as long as you plead it sufficiently to go  
20 forward, then you're entitled to do your discovery. And  
21 one of the things that struck me is when you read her --  
22 opposing counsel's brief that was just filed, um, they  
23 take -- they basically take our allegations and they  
24 restate them leaving out a lot and saying some things  
25 that aren't even in the allegations.



1           THE COURT: No, but when you say -- you've got  
2     this idea that when you get -- that everything's going  
3     to be in discovery. Isn't the way 9(b) should work is I  
4     should limit you to what's properly pled, you, um, go  
5     forward on that claim, if discovery gives rise to other  
6     things, then you timely move to amend?

7           MR. GILLESPIE: Your Honor, obviously I can  
8     live with that. That's a priority.

9           THE COURT: All right. Let's hear from  
10    Mr. Merry.

11          MR. GILLESPIE: All right, thank you, your  
12    Honor.

13          MR. MERRY: Good afternoon, your Honor. I  
14    feel a little bit at a disadvantage since the Court has  
15    indicated that --

16          THE COURT: As you well know, you're not  
17    really at a disadvantage, and further -- and I say this  
18    in a sense to be helpful. I think this issue of which  
19    law applies is complex. I gave you my tendency, because  
20    it is. I think the easier argument for her is the 93A.  
21    Now I've been transparent as I know how. So you use  
22    your 5 minutes wisely.

23          MR. MERRY: Thank you, your Honor.

24                 Just to touch back on the choice of law issue  
25    though, the defendants' brief actually acknowledges on

1 Page 7 that choice of law does not affect the  
2 determination of this motion. So I agree it's complex,  
3 um, and in our response we outline some bases based  
4 primarily on the recent **Hernandez** case from the  
5 Massachusetts SJC basically saying that Massachusetts  
6 will not always enforce these choice of law agreements  
7 that are made in some of these documents, depending on  
8 all the circumstances. And I think, of course  
9 completely -- you have complete agreement from me that  
10 it's a complex issue, however they did do an analysis  
11 there and they came out on the side that would favor our  
12 position.

13 To talk briefly about the 93A claim, um, I'm  
14 having trouble seeing how it doesn't apply here.

15 THE COURT: Because there's no trade or  
16 commerce and because it's either, as she says, it's  
17 employer/employee or it's between the members of the  
18 LLC. It doesn't -- even if the weight of this is  
19 physically in Massachusetts, there are limits to 93A.

20 MR. MERRY: Well that's not what we thought  
21 back in the AG's office 100 years ago. But aside from  
22 that, your Honor.

23 THE COURT: And, yes, Mr. Merry, those were  
24 the days.

25 (Laughter.)

1           THE COURT: But you and I both live with the  
2 law as it now stands.

3           MR. MERRY: Yes, we have to, your Honor, but I  
4 don't think it's against us.

5           Specifically Section 11 talks in terms of services  
6 -- in fact "services" is the first word that's mentioned  
7 when it defines "trade or commerce" in Section 11,  
8 "services." I failed to bring it to the podium, but I  
9 have a copy of the statute here, if it will be helpful.

10          Moreover, the assertion that, um, that this is not  
11 a business transaction, um, my sister herself said that  
12 Mr. Cari was being moved from his position.

13          THE COURT: The words are not is "is it a  
14 business transaction," the words are "in trade or  
15 commerce" This isn't -- this is either employee or  
16 employer or it's the structural organization of a  
17 business entity, it is not engaged -- I mean I'm talking  
18 in conclusory terms, but I think I'm giving your  
19 complaint every fair inference.

20          But go ahead.

21          MR. MERRY: Well I -- I -- my understanding of  
22 Section 11 is that it defines -- actually Section 1  
23 where the definition appears that defines what is "trade  
24 or commerce" and includes services such as consultants.

25          As far as Mr. Cari's role is concerned, it's clear

1 not only that he was being induced to leave his  
2 position, which, by the way, he ceases being an employee  
3 when that happens, and he is moved into this consultant  
4 role, which is, I think, alluded to at least in the term  
5 sheet. But beyond that our allegations include a  
6 statement by defendant Velis that he says to Mr. Cari,  
7 and I'm only paraphrasing, "You'd better go get your  
8 plans made for your -- get your certificate for your  
9 LLC, because you're going to be" -- now this is my gloss  
10 on that, "that you are going to be a separate business  
11 that we're contracting with, so we want to contract with  
12 you separately."

13 Therefore -- and, by the way, I don't think 93A  
14 requires an arm's-length transaction, I think that the  
15 abuses that occur between businesses, regardless of  
16 where they came from or what the relationship may have  
17 been beforehand, still fall under Section 11, and that's  
18 why this -- and moreover, your Honor, this is 12(b)(6),  
19 this is the pleading that counts, as the Court has  
20 mentioned previously, and the allegations are more than  
21 sufficient to make out unfair deceptive practices.

22 I wanted to add just one final thing. My sister's  
23 papers talk about, um, how this 93A claim is only an  
24 alternative to our common law claims. But as I suspect  
25 the Court remembers no doubt better than I do, in *Slaney*

1 and **Westwood Auto**, the Massachusetts court, um, it was  
2 very explicit that 93A created new substantive rights by  
3 making conduct unlawful which was not unlawful under the  
4 common law or any prior statute.

5 So by asserting this claim, your Honor, that means  
6 that the facts allege, even if they don't rise to the  
7 level of satisfying the requirements for the torts that  
8 we've alleged, may still rise to being an unfair  
9 deceptive practice, because I say it's something that  
10 we've -- that has been a broken area of law at least in  
11 years somewhat gone by, but we haven't forgotten them.  
12 I think I've taken my time, your Honor. Thank you.

13 THE COURT: Thank you very much.

14 All right, here's the Court's order. The motion  
15 to dismiss is denied in part and allowed in part. It's  
16 denied as to, um, the count for breach of contract and  
17 estoppel. It's denied as to the breach of the covenant  
18 of good faith and fair dealing insofar as there is a  
19 claim that they interfered with his performance under  
20 the so-called "contract," um, Cari's performance. It's  
21 denied as to fraudulent misrepresentation based upon the  
22 term sheet and those particular allegations that are set  
23 forth in quotes. It's allowed as to negligent  
24 misrepresentation. It's allowed as to the violation of  
25 General Laws 93A.

1           The Court believes that the choice of law need not  
2     be definitively resolved at this stage, but a written  
3     order is appropriate, and so I'm going to take that  
4     under advisement and address it. If, in the discipline  
5     of writing, I come to revise any of the rulings I've  
6     just made, I reserve the right to revise them.

7           Now, with the case going forward, let's see if we  
8     can spare you the need for a 16.1 conference and I'll  
9     touch on the points of that conference so we don't have  
10    to come back.

11          Do you want to try this before a magistrate judge  
12    and a jury? And you've got to both agree and I don't  
13    care.

14                   (Laughter.)

15           THE COURT: I mean I really don't care.

16           MS. DOWNEY: I just have not conferred with  
17    the client about those matters, your Honor.

18           THE COURT: All right, you've got to confer  
19    among yourselves within two weeks. You can let me know.

20          When do you want to try it? The latest you can  
21    try it is in April of 2020. You'll go on the running  
22    trial list. But I can do it a lot faster than that.

23           MR. GILLESPIE: Well we can take some  
24    discovery, your Honor. I can tell you my calendar is  
25    good in April of 2020.

1 (Laughter.)

2 THE COURT: Well how about that?

3 MS. DOWNEY: I have to talk to the client,  
4 your Honor, we haven't talked about trial schedule at  
5 all.

6 THE COURT: Well, you know, with all respect  
7 you should have. When you come to court you ought to  
8 know something about your case, because I'm trying to  
9 save you money here.

10 MS. DOWNEY: I understand, your Honor.

11 THE COURT: It's on the running trial list for  
12 April, 2020. Within two weeks time you file a joint  
13 proposed case management schedule.

14 Some idiosyncrasies in a case management schedule.  
15 One, the latest date for the filing of motions for  
16 summary judgment has got to be three months before the  
17 trial month. And, um, I am very strict on experts.  
18 Under Rule 702, you file the expert reports, you know  
19 the rules say that they -- you have to list all the  
20 places the expert has been retained, all the cases, and  
21 I want docket numbers so the other side can go look them  
22 up. And also you have to do the payment arrangements.

23 But here's the particular concern. No expert  
24 under 702 is going to testify to anything that's not in  
25 the expert report. That's not limited to 20 pages. And

1     you pass it up when the expert takes the stand. And  
2     it's an evidentiary objection on the part of the other  
3     side. You can say "Object, not in the expert report."  
4     I thumb through, if the expert is qualified, I say, "She  
5     may testify in accordance with the report." But she's  
6     got to -- she doesn't have to read it, but she's got to  
7     stick to the report.

8             All right, that's the order. And we'll call the  
9     next case.

10             (Ends, 2:30 p.m.)

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C E R T I F I C A T E

I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER,  
do hereby certify that the foregoing record is a true  
and accurate transcription of my stenographic notes  
before Judge William G. Young, on Tuesday, March 5,  
2019, to the best of my skill and ability.

/s/ Richard H. Romanow 3-20-19

\_\_\_\_\_  
RICHARD H. ROMANOW      Date